Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 88-1159

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

ALEXSANDRO VINCENTE BRAVO,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

Does the "fruit of the poisonous tree" doctrine apply to live-witness testimony when the identity of the witness is derived from statements made by the criminal defendant in violation of Miranda v. Arizona, but held to be otherwise voluntary under the Fifth Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
REPLY ARGUMENT	1
CONCLUSION	7
CERTIFICATION	9
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1

TABLE OF CASES AND AUTHORITIES

Michigan v. Tucker
417 U.S. 433
94 S.Ct. 2357
41 L.Ed.2d 182 (1974) 1,3,4,5,6,7

Miranda v. Arizona
384 U.S. 436
86 S.Ct. 1602
16 L.Ed.2d 694 (1966) 1,2,3,4,5,6,7

Oregon v. Elstad
470 U.S. 298
105 S.Ct. 1285
84 L.Ed.2d 222 (1985) 6,7

United States v. Ceccolini
435 U.S. 268
98 S.Ct. 1054
55 L.Ed.2d 268 (1978) 3,4

Wong Sun v. United States
371 U.S. 471
83 S.Ct. 407
9 L.Ed.2d 441 (1963) 1,3,5,6,7

Authorities

Arizona Rules Criminal Procedure
Rule 31.18 7

United States Constitution
Fifth Amendment 4

REPLY ARGUMENT

The State of Arizona has not waived the issues presented in the petition for certiorari.

In the petition for writ of certiorari, petitioner raised two reasons why the Arizona Supreme Court erred in ordering the testimony of a live witness suppressed due to a Miranda[1] violation. The first claim raised was that the "fruit of the poisonous tree" doctrine of Wong Sun[2] does not apply to evidence derived from a Miranda violation under Michigan v. Tucker, 417 U.S. 433 (1974). In the opposition to the petition for the writ, respondent claims that the state has waived the Michigan v. Tucker issue by failing to raise the issue in the trial court and in the

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1. Miranda v. Arizona, 384 U.S. 436 (1966).

2. Wong Sun v. United States, 371 U.S. 471 (1963).

Arizona Supreme Court. Respondent is in error, and has misconstrued the record below.

In the trial court, the state conceded that the police violated Bravo's Miranda rights by continuing to ask questions after Bravo indicated that he wished to cut off questioning and return to his cell. The concession extended to only those statements made after the Miranda violation.[3] The state did not concede that Bravo's statements were involuntary, but, to the contrary, presented substantial evidence to prove the voluntariness of the statements made. At the conclusion of the hearings on the motion to suppress, the trial court agreed with the state's position. The trial court held that the initial statements were taken in accordance with

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3. The concession appears in the state's oral response to Bravo's motion to suppress. (Appendix A to Reply Brief at A-2.)

the dictates of Miranda, the statements taken after Bravo requested to cut off questioning were in violation of Miranda, and that the entire statement was voluntary. (Appendix B to Reply Brief.)

Thereafter, Bravo moved to suppress the evidence derived from the Miranda violation based on Wong Sun. The state filed a response in opposition to the motion stating, "[I]n Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974), the Court held admissible the testimony of a live witness whose identity was discovered through the Defendant's statement after inadequate Miranda warnings." (Appendix C to Reply Brief at C-7.) While the state went on to address the claim under Ceccolini,[4] the state did not concede, or waive, the

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4. United States v. Ceccolini, 435 U.S. 268 (1978).

applicability of Michigan v. Tucker in the trial court.

Bravo appealed the ruling of the trial court, contending that the statements made by him were involuntary and that the testimony of the witness whose identity was learned from those statements was the fruit of the involuntary confession. The state responded by arguing that the statements made by Bravo were voluntary under the Fifth Amendment, and that, if involuntary, the evidence derived from the statements need not be excluded under United States v. Ceccolini. (Appendix E to Petition for Certiorari.) The state likewise argued:

> In Michigan v. Tucker, 417 U.S.____, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Court refused to apply the "fruit" doctrine to a third-party, live witness who was located through the use of confession in violation of Miranda, but otherwise voluntary. The Court noted that the prophylactic Miranda rights

> were only instituted to protect the right against compulsory self-incrimination, but were not themselves protected rights. Id. 417 U.S. at 446.

(Appendix E to Petition for Certiorari.) The state has never conceded or waived the Michigan v. Tucker issue.

The Arizona Supreme Court affirmed the trial court's finding that Bravo's statements were voluntary. (Appendix A to Petition for Certiorari at A-32.) The Arizona Supreme Court, thereafter, suppressed the evidence derived from the voluntary, but Miranda violative statement based on the "fruit" doctrine of Wong Sun. (Appendix A to Petition for Certiorari at A-34 through A-57.) The state filed a timely motion for reconsideration asking the state supreme court to reconsider the applicability of the Wong Sun doctrine as it applies to Miranda violations in light of Michigan

v. Tucker and Oregon v. Elstad. (Appendix B to Petition for Certiorari at B-2 through B-11.) The Arizona Supreme Court denied the state's motion.

Respondent claims that the state has waived the issue of whether Wong Sun applies to evidence derived from a Miranda violation by failing to present the issue to the trial court or the Arizona Supreme Court. As noted above, the state properly presented the Michigan v. Tucker argument to both the trial court and the Arizona Supreme Court. Supra at 1, 4. Furthermore, assuming that the state had not previously presented the Michigan v. Tucker argument, in the motion for reconsideration the state properly preserved the Michigan v. Tucker argument by arguing that the Arizona Supreme Court erred as a matter of law regarding that

issue. Rule 31.18, Ariz.R.Crim.P. The Michigan v. Tucker issue has not been waived and may be addressed by this Court.

CONCLUSION

The State of Arizona prays this Court will accept the petition for writ of certiorari and apply the holding of Oregon v. Elstad and Michigan v. Tucker and find that the "fruit of the poisonous tree" doctrine of Wong Sun does not apply to those cases where the police failed to honor a Miranda invocation and thereafter derived evidence from the statements given. Likewise, this Court should find that the "free will" of a live witness attenuates a Miranda violation, thereby precluding the application of the exclusionary rule to witnesses discovered from statements obtained in violation of Miranda.

DATED this 16th day of February, 1989.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

Paul J McMurdie

PAUL J. McMURDIE
Assistant Attorney General

Attorneys for PETITIONER

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

PAUL J. McMURDIE, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Reply to Brief in Opposition to Petition for Writ of Certiorari upon George Haskel Curtis, Curtis and Cunningham, 5610 East 22nd Street, Tucson, Arizona, 85711, Attorney for Alexsandro Vincente Bravo, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid,

addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

DATED this 16th day of February, 1989.

PAUL J. McMURDIE
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

SUBSCRIBED AND SWORN to before me this 16th day of February, 1989.

MARGUERITE A. POTTER
NOTARY PUBLIC

My Commission Expires:

September 22, 1989

CRM86-0274
8782d map

APPENDICES

APPENDIX A

[Filed February 5, 1986]

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	No. CR-13184
vs.	)	No. CR-13421
	)	
ALEXSANDRO BRAVO,	)	
	)	Hearing re
Defendant.	)	Pending Motions.
	)	

Tucson, Arizona

November 4, 1985

BEFORE: The Hon. Gilbert Veliz, Judge

APPEARANCES:

Rick Unklesbay, Deputy County Attorney, appearing for the Plaintiff;

George Curtis, Assistant Public Defender, appearing for the Defendant.

TRANSCRIPT OF COURT PROCEEDINGS

George G. Silbernagel
RPR & Official Court Reporter
Division Two, Pima County
Tucson, Arizona 85701

THE COURT: Mr. Unklesbay?

MR. UNKLESBAY: To start with, Judge, as far as the statements that are concerned past Page 5 where Mr. Bravo asserts that he doesn't want to answer any more questions, State wouldn't use that even if Court would rule we were entitled to it. I think there are problems with it.

We don't intend to use his statement past Page 5. Other than that, I think everything is clearly admissible. I think the Court can make that decision very easily based on the evidence which you've heard.

APPENDIX B

(MINUTE ENTRY OF NOVEMBER 4, 1985)

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: GILBERT VELIZ

CASE NO. C R - 1 3 1 8 4

C R - 1 3 4 2 1

Court Reporter: G. Silbernagel

DATE November 4, 1985

STATE OF ARIZONA Rick Unklesbay

vs.

ALEXSANDRO BRAVO, George Curtis

EVENT SUMMARY

Type: M to suppress
Result: granted in part/denied in part
Date: Time: Length: Div: Req:
Type: Trial
Result: reset to 11-19 10:00 a.m.
Date: 11-12-85 Time: Length: Div: Req:
Type: pretrial Motions Result:
Date: 11-18 Time: 1:30 Length: Div:
Req:
Type: Result:
Date: Time: Length: Div: Req:

M I N U T E E N T R Y

RESUMPTION OF HEARING ON DEFENDANT'S

MOTION TO SUPPRESS STATEMENTS;

DEFENDANT'S MOTION TO CONTINUE TRIAL

DATE:

Defendant present, in custody.

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS:

Messrs. Curtis and Unklesbay argue to the Court.

For the reasons set forth on the record,

IT IS ORDERED that the statements made by the defendant after he stated that he did not want to answer any more questions are suppressed.

IT IS FURTHER ORDERED that the motion to suppress the other statements that were made prior to that time is denied; and

THE COURT FINDS that the defendant made the statements voluntarily and intelligently after having been advised of his constitutional rights.

DEFENDANT'S MOTION TO CONTINUE TRIAL DATE:

Messrs. Curtis and Unklesbay argue to the Court.

IT IS ORDERED granting the defendant's motion to continue the trial for one week. The extraordinary reason for the

continuance is the fact that defendant's counsel has been working on two homicide cases at the same time and needs additional time for the preparation of this case.

IT IS THEREFORE ORDERED that the trial is rescheduled for November 19, 1985 at 10:00 a.m.

IT IS FURTHER ORDERED that the pretrial order heretofore issued continues in full force and effect in every other respect.

IT IS FURTHER ORDERED that the pretrial motions dealing with dessureault and the defendant's motion to exclude evidence because of the "poison tree doctrine" are set for hearing on November 18, 1985 at 1:30 p.m.

IT IS FURTHER ORDERED that the defendant file his notice of defenses on or before November 8, 1985 at 5:00 p.m.

cc:

Hon. Gilbert Veliz

County Attorney

George Curtis, Esq.

Sheriff

Rosemarie Chastain
Deputy Clerk

APPENDIX C

(STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.)

IN THE SUPERIOR COURT OF THE

STATE OF ARIZONA IN AND FOR

THE COUNTY OF PIMA

THE STATE OF ARIZONA,	)	
	)	No. CR-13421 and
Plaintiff,	)	No. CR-13184
	)	
vs.	)	
	)	STATE'S RESPONSE
ALEXSANDRO BRAVO,	)	TO DEFENDANT'S
	)	MOTION TO
Defendant.	)	SUPPRESS
	)	EVIDENCE

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his deputy, RICK UNKLESBAY and hereby responds and objects to Defendant's Motion to Suppress Evidence as set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted this 12th day of November, 1985.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

BY /S/
Rick Unklesbay
Deputy County Attorney

Copies delivered/mailed this 12th day of November, 1985, to:

George Curtis
Attorney at Law
5610 E. 22nd St.
Tucson, Arizona 85701

Honorable Gilbert Veliz
Judge of Superior Court
Division Two

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

The facts are set forth in the State's Opposition to Defendant's Motion to Suppress Statements. Additional facts are set forth below.

Defendant Bravo seeks to exclude the testimony of a number of witnesses at trial. Those witness are Danny Champion, Jerry Galvan, and Ernie and Sergio Hollingsworth. The basis for Defendant's

Motion is that the State learned of those persons during the course of an interview of the Defendant but only after Defendant indicated on tape that he no longer wished to answer questions. That portion of Defendant's statement beginning with that assertion has been suppressed as violative of Defendant's right to remain silent. Defendant's motion indicates that Wong Sun v. United States, 371 U.S. 471, 80 S.Ct. 407 (1963) is controlling and that the testimonial evidence must also be suppressed.

Some testimony has already been heard regarding this motion. Detective Perry Lowe of the Tucson Police Department testified that he, in fact, did continue questioning Defendant Bravo after Bravo stated his desire not to answer further questions. Detective Lowe further testified that he did so in order to determine if Bravo knew more facts

about the crimes in question to rule out the possibility that Bravo was fabricating his involvement. It was then that the name of Danny Champion came to light.

Fifteen days after interviewing Bravo, detectives met with Danny Champion and interviewed him. During the interview Champion told the officers he had been with Bravo during the armed robbery. Two weeks later, Champion again met detectives and informed them that he had information regarding the homicide.

From Champion officers got the name of Jerry Galvan. Officers met with Galvan who also supplied officers with information on the homicide. The name Hollingsworth was obtained from Bravo prior to his statement requesting that no further questions be asked, and even earlier by Detective Frank Martinez.

LAW

Although Defendant relies on Wong Sun v. United States, id., as authority to suppress the testimony of these witnesses, several cases regarding such live-witness exclusions have been decided since that 1963 decision. In U.S. v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054 (1978), the United States Supreme Court considered the difference between possible exclusion of illegally obtained inanimate evidence and that of live-witness testimony. In that case, an illegal search by law enforcement resulted in the discovery of a witness who later was called to testify at trial. In holding that the testimony of the live witness, even though discovered in an illegal search, was proper, the Court noted that:

> The fact that the name of a potential witness is disclosed to

> police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory, and volition interact to determine what testimony he will give. The uniqueness of this human process distinguished the evidentiary character of a witness from the relative immutability of inanimate evidence. Id. at U.S. 277.

The Court offered varying factors to consider in determining the admissibility of the live-witness testimony. The degree of free will exercised by the witness is relevant to determine the extent that the purpose of the exclusionary rule will be advanced by its application. The Court found that the degree of free will necessary to dissipate the taint of illegality will more likely be found in cases of live witness testimony than other kinds of evidence. Id. U.S. at 276. The Court must assess the effect of the illegal search on the exercise of the witness's

free will. Where the police misconduct did not induce the witness's cooperation, the testimony should not be suppressed even though the unreasonable conduct led to the witness's testifying. U.S. v. Hooton, 662 F.2d 628, (1981, 9th Cir.) U.S. v. Leonardi, 623 F.2d. 746, (1980, 2nd Cir.)

An additional factor to consider is that exclusion of a live witness perpetually disables that witness from testifying about relevant and material issues. The Supreme Court in Ceccolini, supra, found such rules to be "serious obstructions to the ascertainment of truth." Id. at 277. Likewise, in Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974), the Court held admissible the testimony of a live witness whose identity was discovered through the Defendant's statement after inadequate Miranda warnings. Approving

Tucker again in Ceccolini, the Court reaffirmed its disapproval of a per se exclusion:

> For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. ... Here Respondent's own statement, which might have helped the prosecution show respondent's guilty conscience at trial, had already been excised from the prosecution's case. . . To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent. Ceccolini at 278.

The Ninth Circuit Court of Appeals in U.S. v. Hooton, supra, examined what determinations must be made in light of the Supreme Court's decision in Ceccolini. Hooton had sought suppression of live testimony from witnesses discovered in an illegal search

of Hooton's records of gun transactions. The Ninth Circuit noted that the Court should consider (1) The stated willingness of the witness to testify; (2) The role played by the illegally seized evidence in gaining the witnesses cooperation; (3) the proximity between the illegal behavior, the witnesses decision to cooperate and the actual testimony at trial; and (4) the police motivation in conducting the search. Hooton at 632. These factors should assist the Court in determining whether a significant attenuation exists between the police misconduct and the live-witness testimony. Id. As already stated, where the misconduct does not induce cooperation, the testimony will not be suppressed.

Importantly, the Court in Hooton does not limit this standard only to "good citizen" witnesses. The Court

recognized a number of cases where the live witness testimony was not from a a [sic] citizen witness: U.S. v. Leonardi, supra (unindicted co-conspirators testifying due to plea bargain); U.S. v. Brookins, 614 F.2d. 1037 (1980, 5th Cir.) (under grant of immunity); U.S. v. Stevens, 612 F.2d. 1226 (co-conspirators testifying pursuant to plea bargain). Hooton, supra at 633.

An important theme running though [sic] the cases cited above has been whether exclusion of the live-witness testimony would serve the remedial objectives of the exclusionary rule. The penalties imposed must bear some relation to the purpose which the law serves. Thus, a principle [sic] factor of attenuation is the motivation of the police in conducting the search. In Ceccolini, the Court found that as the police motivation was not to find a

willing witness, that exclusion would have no deterrent effect and the cost of excluding forever a live witness was too great. Id. at 280.

In applying these principals [sic] to Defendant Bravo, the testimony of Danny Champion and Jerry Galvan is admissible. As in Ceccolini, detectives in the instant case obtained a name from Bravo, not being evidentiary in and of itself. Although that name eventually led to statements from Danny Champion, that evidence was subject to the will, perception, and memory of Champion concerning events occurring almost two and one half years earlier. This Court will hear evidence that Champion not only willingly talked to officers but in fact, recontacted them later to give them further information. The State is now seeking to have Champion testify one and one half years after that initial

statement, a further factor as to the "proximity" between the illegal behavior, the decision to cooperate and the actual trial testimony.

Finally, the importance of the police motivation for the search must be noted. Detective Lowe has previously testified that the reason for continued questioning of Bravo was to ensure the officers that Bravo knew facts about the case and was indeed the man sought. Exclusion of Champion's testimony could have not [sic] deterrent effect on such conduct nor in fact would any reasonable person want to deter the police from possibly clearing an innocent person.

Ceccolini, supra, concludes that while no mathematical weight can be given to the factors mentioned they all point to one conclusion. That is:

> That the exclusionary rule should be invoked with much greater reluctance where the claim is

> based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. Id. at 280.

Interestingly, in a concurring opinion, in Ceccolini, the Chief Justice wrote that the distinction between live-witness testimony and other types of evidence is so fundamental that the fact-finder should not be prevented from hearing the live evidence except under the most remarkable of circumstances. The Chief Justice noted no such circumstances had ever been presented. Id.

The State submits that such is the leaning of the Court presently and that to exclude such relevant and material witness would unduly and unnecessarily prevent the fact-finder from deciding the case on the true facts. The case law makes clear that

such testimony is not only permissible, but essential to a fair determination of facts. As quoted in Ceccolini from McGuire v. United States, 273 U.S. 95 (1927),:

> A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played by the rule.

Based on the foregoing, it is respectfully requested that Defendant's Motion to Suppress be denied.

Respectfully submitted this 12th day of November, 1985.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By /S/
Rick Unklesbay
Deputy County Attorney

8787d